IN THE MICHIGAN SUPREME COURT
Appeal from the Michigan Court of Appeals
(Boonstra, P.J., Ronayne Krause and Swartzle, JJ.)

RICHARD WILLIAM DORKO, **Plaintiff-Appellant,**	**Supreme Court Docket No. 156557**
v	**COA Docket No.: 333880**
SHERRY SUE DORKO, **Defendant-Appellee.**	**Kalamazoo County Circuit Court** **Case No. 2004-5765-DM** **Hon. G. Scott Pierangeli**

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APPELLEE SHERRY SUE DORKO'S ANSWER TO PLAINTIFF-APPELLANT'S APPLICATION FOR LEAVE TO APPEAL

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STATEMENT OF APPELLATE JURISDICTION

Appellee Sherry Sue Dorko does not contest that Appellant Richard William Dorko timely filed her Application for Leave to Appeal and that this Court has jurisdiction pursuant to MCR 7.303(B)(1).

COUNTER-STATEMENT OF QUESTIONS PRESENTED

I. Appellant contends that the Trial Court and the Court of Appeals erred in denying the Appellant's Motion to Set Aside and to Deny Entry of a Qualified Domestic Relations Order for the division of pension funds. Both the Trial Court and the Court of Appeals recognized that there was no time bar, by laches or limitations, to entry of the QDRO that had begun making payments to the Appellant only one year earlier. Did the lower courts both err?

Appellant Answers: Yes.

Appellee Answers: No.

The Court of Appeals Answered: No.

The Trial Court Answered: No.

COUNTER-STATEMENT OF FACTS AND REASONS FOR DENYING THE APPLICATION

This application for leave to appeal originates from certain post-judgment proceedings relative to a Judgment of Divorce (hereinafter the "Judgment"), entered August 3, 2005. [Judgment of Divorce; Register of Actions.] The Judgment awarded ½ of the marital portion of Appellant's General Motors Hourly-Rate Employees' Pension Plan to the Appellee. At the time of the Judgment, the Appellant was still an active General Motors employee. In fact, Appellee was never advised when Appellant planned to retire, nor became eligible to begin receiving of pension payments.

Appellee filed her first proposed Qualified Domestic Relations Order, under MCR

2.602(B)(3), on August 11, 2015. [Register of Actions.] The Appellant never objected to entry of the first proposed QDRO (hereinafter the "August 19, 2015 QDRO"), which entered by the Kalamazoo County Circuit Court – Family Division on August 19, 2015. More specifically, Appellant did not assert any violation of statutes of limitations, nor did he assert the equitable defense of "laches." It has been subsequently learned, on information, that the Appellant had begun receiving his monthly pension benefit as of 2015.

The August 19, 2015 QDRO was submitted to Fidelity, the pension plan administrator. On January 4, 2016, Fidelity notified the parties, by letter, that the August 19, 2015 QDRO was not "qualified" due to several language deficiencies relative to the standard Fidelity administered QDRO draft.

The Appellee corrected the identified deficiencies in the August 19, 2015 QDRO and submitted a second, amended QDRO (hereinafter the "January 8, 2016 proposed QDRO") for entry under MCR 2.602(B)(3). [Register of Actions.] Appellant objected to the entry of the January 8, 2016 proposed QDRO, citing that entry of the QDRO was not fair as his circumstances and health had changed since the Judgment of Divorce had entered, that the stated date of marriage was incorrect, that the terminology was inaccurate with regard to early retirement supplement/subsidy, and possibly other bases that are unclear. [Register of Actions.] Again, Appellant did not assert any violation of statutes of limitations, nor did he assert the equitable defense of "laches."

The Appellant, however, did not file a proposed alternate Order, as required to be filed with an objection pursuant to MCR 2.602(B)(3)(c). A 15 minute motion hearing

was held on this Objection, but was adjourned without ruling to a scheduled 2 hour evidentiary hearing. [Transcript of Objection to Seven Day Order.]

Approximately one week prior to the evidentiary hearing, through recently retained counsel, the Appellant filed a Motion to Set Aside First Qualified Domestic Relations Order and To Deny Second Qualified Domestic Relations Order. [Register of Actions.] This was the first time that Appellant claimed that entry of any QDRO was barred by application of the statute of limitations. Appellant asserts that a general 10 year statute of limitations on enforcement of judgment applies in this instance and bars entry of any QDRO, given that more than 10 years have expired since entry of the Judgment.

Appellee opposed Appellant's motion and the matters were fully briefed for the trial court's review and ruling. A hearing was held on April 25, 2016 and counsel for each party argued their positions. [Transcript of Motion to Set Aside Order.] On May 16, 2016, the trial court denied the Appellant's Motion to Set Aside First Qualified Domestic Relations Order and to Deny Second Qualified Domestic Relations Order. An order confirming such denial was entered on June 27, 2016. [Register of Actions.] The trial court has also denied the Appellant's Motion to Stay Proceedings by Order, entered May 20, 2016. The Amended QDRO was entered by the Court on June 24, 2016. [Transcript of Opinion; Register of Actions.]

The decision of the Michigan Court of Appeals from which this Application for Leave to Appeal is taken is its unpublished opinion, released on August 17, 2017. The Court of Appeals based its decision, in principal part, upon the application of the

published opinion of a different appellate panel of the Court of Appeals in Joughin v Joughin, _____ Mich App _____; _____ NW2d _____ (2017) (Docket No. 329993), which was released for publication on July 11, 2017. In this matter, the Court of Appeals' decision affirmed the Kalamazoo County Circuit Court's *Order Denying Plaintiff's Motion to Set Aside First Qualified Domestic Relations Order and to Deny Second Qualified Domestic Relations Order*, dated June 27, 2016.

Between the Appellant's waiver of the issue, the application of federal preemption to questions involving ERISA qualified pension plans and the lower courts' exhaustive opinions, there are numerous reasons why this Court should summarily deny the Application.

- Appellant failed to raise the Statute of Limitations defense in his first responsive pleadings to the Appellee's submission of the August 19, 2015 QDRO. Appellant has therefore waived any issues regarding application of a limitations period to the proposed entry of this QDRO, or its later amendment.
- Appellant has consistently failed to explain why federal preemption to questions involving ERISA qualified pension plans would not apply in the instance of Appellant's ERISA qualified pension plan. The federal preemption scheme, set forth in 29 U.S.C. §1144(a), applies until a qualified domestic relations order is entered by the state court. The Judgment of Divorce was not a qualified domestic relations order and, accordingly, in and of itself, did not confer an enforceable right, or an accrued claim, to receive pension payments from the Appellant's ERISA qualified plan.

- The Court of Appeals' opinion in this case is unpublished and turns on the unique factual circumstances of this case. This particular opinion has no lasting jurisprudential significance.
- The Court of Appeals' opinion in Joughin, *supra* at 4, has not been appealed to this Court by any application for review. Accordingly, there is no opportunity for consolidated review of these two cases and appeal would proceed solely on the basis of prospective review of an unpublished decision of the Court of Appeals that, again, is of no lasting jurisprudential significance.
- The Court of Appeals' panel in this matter, following Joughin, correctly recognized that the act of submitting a QDRO was a ministerial act, taken in accordance with the direction or terms of the Judgment, and was not a further act of enforcing a money judgment against this Appellant.
- The Appellant has failed to satisfy her appellate burden.

For all of these reasons, and those stated in more detail below, this Court should summarily deny the Appellant's Application for Leave to Appeal.

STANDARD OF REVIEW

"The applicability of a statute of limitations is a question of law that we review de novo. Ins. Comm'r v Aageson Thibo Agency, 226 Mich App 336, 340-341; 573 NW2d 637 (1997)." AG v Harkins, 257 Mich App 564, 569; 669 NW2d 296 (2003) [emphasis added]. See also, Loweke v Ann Arbor Ceiling & Partition Co., LLC, 489 Mich 157, 162; 809 NW2d 553 (2011) [courts review questions of law under a de novo standard.]

In addition, it is a fundamental rule of appellate review that an appealed order is

presumed to be correct. House v Gibbs, 4 Mich App 519, 524; 145 NW2d 248 (1966). It is the appellant's burden to demonstrate that the lower court made an error requiring reversal, by producing an adequate appellate record and presenting argument and legal authority demonstrating error requiring reversal. Three Lakes Ass'n v Whiting, 75 Mich App 564, 579; 255 NW2d 686 (1977).

Because the Appellant has waived the defense of statute of limitations and has presented no compelling ground warranting a grant of leave, this Court should summarily deny the application. The unique factual circumstances of this dispute, the non-binding nature of the Court of Appeals' unpublished opinion, and the numerous alternative grounds for affirmance make this case particularly ill-suited for discretionary leave.

ARGUMENT

I. There is no need to review the lower courts' decisions to enter or to affirm entry of a QDRO that simply complied with the terms of the parties' Judgment of Divorce.

The Court of Appeals' panel in this matter, following Joughin, correctly recognized that the act of submitting a QDRO was a ministerial act, taken in accordance with the direction or terms of the Judgment, and was not a further act of enforcing a money judgment against this Appellant. Quoting Joughin, the Court of Appeals held that "'the act to obtain entry of a proposed QDRO is a ministerial task done in conjunction with the divorce judgment itself." Joughin v Joughin, ____ Mich App ____; ____ NW2d ____ (2017)(Docket No. 329993), slip op at 4. "Accordingly, when a party complies with the court's instructions [in the divorce judgment to submit a proposed

QDRO], albeit late, as here, the party is simply engaged in supplying documents and information to the court, to comply with its ministerial obligations under the judgment – nothing more, nothing less. Id.'" Dorko v Dorko, 2017 Mich.App. LEXIS 1348. The Appellant has failed to identify any legally sufficient basis upon which this Court should grant review of this well-founded appellate opinion.

A. The Appellant waived consideration of the Statute of Limitations defense when he failed to assert it in his initial response to the first submitted QDRO.

"[F]ailure to timely raise an issue waives review of that issue on appeal." Napier v Jacobs, 429 Mich 222, 227; 414 NW2d 862 (1987). MCR 2.116(C)(7) contemplates summary dismissal of a matter as follows:

> "(7) Entry of judgment, dismissal of the action or other relief is appropriate because of release, payment, prior judgment, immunity granted by law, statute of limitations, statute of frauds, an agreement to arbitrate or to litigate in a different forum, infancy, or other disability of the moving party, or assignment or other disposition of the claim before the commencement of the action." [Emphasis added].

MCR 2.116(D)(2) provides:

> "(2) The grounds listed in subrule (C)(5), (6), and (7) must be raised in a party's responsive pleading, unless the grounds are stated in a motion filed under this rule prior to the party's first responsive pleading. Amendment of a responsive pleading is governed by 2.118."

MCR 2.111(F)(3) further provides:

> (3) Affirmative Defenses. Affirmative defenses must be stated in a party's responsive pleading, either as originally filed or as amended in accordance with MCR 2.118. Under a separate and distinct heading, a party must state the facts constituting:
>
> "(a) an affirmative defense, such as contributory negligence; the existence of an agreement to arbitrate; assumption of risk; payment; release; satisfaction; discharge; license; fraud; duress; estoppel; statute of

> frauds; statute of limitations; immunity granted by law; want or failure of consideration; or that an instrument or transaction is void, voidable, or cannot be recovered on by reason of statute or nondelivery." [emphasis added]

Case law in Michigan is clear. "Affirmative defenses, such as expiration of the period of limitation, must be raised in a party's responsive pleading and must be supported by factual allegations." Horvath v Delida, 213 Mich App 620; 540 NW2d 760, 764 (1995). "Under Michigan Court Rule 2.111(F)(3), a party must state an affirmative defense under a separate heading and must include the facts constituting a defense." Department of Envtl. Quality v Bulk Petroleum Corp., 276 Mich App 654; 741 NW2d 857, 864 (2007).

This requirement applies to responses to motions as well. In Bulk, the Court of Appeals noted the defendants' 'failure to raise their statute of limitations defense in response to [the] plaintiffs' motion for summary disposition.' Id. at 865. It was also noted that the defendants had made 'no reference to any statute of limitations as an affirmative defense to plaintiff's claims,' in their response brief. Id. Bulk held that the statute of limitations defense had been waived. See also, Palenkas v Beaumont Hospital, 432 Mich 527; 443 NW2d 354 (1989) (party's repeated failure to raise statute of limitations defense in a pre-trial motion and in its answer and the party's failure to produce evidence on this point waived the affirmative defense.)

In the case at bar, the Appellant didn't file any responsive pleading to the proposed entry of the first QDRO submission by this Appellee, let alone raise a statute of limitations defense. In his second filing with the Court, upon the

proposed submission of the amended QDRO, the Appellant did not raise a statute of limitations defense, but rather merely asserted that his present financial circumstances should bar entry of the amended QDRO at this time. The statute of limitations defense was not interposed until the *third* set of responsive pleadings, set forth in the Appellant's *Motion to Set Aside First Qualified Domestic Relations Order and to Deny Second Qualified Domestic Relations Order*.

When this Appellant took no action to prevent the entry of the first submitted QDRO by failing to file any responsive pleading to that submission, Appellant waived any right to raise a statute of limitations defense in regard to the submission of either the first QDRO or the proposed, and now entered, amended QDRO. Because this defense was not timely raised before the Trial Court, this Court should deny leave to consider the Appellant's unpreserved issue.

B. The Appellant's pension plan was an ERISA qualified pension plan. Under ERISA, the Judgment of Divorce did not constitute a QDRO. Until a QDRO entered, the Appellee had no enforceable right, or accrued claim to receive her assigned portion of the pension plan, and without such right the statute of limitations was not triggered.

The term *Qualified Domestic Relations Order* (hereinafter "QDRO") finds its origin in the federal Employee Retirement Income Security Act, otherwise and hereafter known as "ERISA." 29 USC ch. 18 §§1001-1461. A QDRO is defined to mean a "domestic relations order –

(I) which creates or recognizes the existence of an alternate payee's

right to, or assigns to an alternate payee the right to, receive all or a portion of the benefits payable with respect to a participant under a plan, and

(II) with respect to which the requirements of subparagraphs (C) and (D) are met, and . . ."[1]

29 USC § 1056(d)(3)(B)(i)(I) and (II).

Under the standards set forth in 29 USC §1056(d)(3) et seq., the Judgment of Divorce entered in this matter does not constitute a QDRO.[2] Minimally, among other

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[1] 29 USC §1056(d)(3)(C) and (D) provide as follows:

(C) A domestic relations order meets the requirements of this subparagraph only if such order clearly specifies –

(i) the name and the last known mailing address (if any) of the participant and the name and mailing address of each alternate payee covered by the order,

(ii) the amount or percentage of the participant's benefits to be paid by the plan to each alternate payee, or the manner in which such amount or percentage is to be determined.

(iii) the number of payments or period to which such order applies, and

(iv) each plan to which such order applies.

(D) A domestic relations order meets the requirements of this subparagraph only if such order --

(i) does not require a plan to provide any type or form of benefit, or any option, not otherwise provided under the plan,

(ii) does not require the plan to provide increased benefits (determined on the basis of actuarial value), and

(iii) does not require the payment of benefits to an alternate payee which are required to be paid to another alternate payee under another order previously determined to be a qualified domestic relations order.

[2] In his Application, at page 4, the Appellant employs a red herring argument, relying on Neville v Neville, 295 Mich App 460; 812 NW2d 816 (2012), to assert that:

"In 2012, the Michigan Court of Appeals held that a QDRO is a part of the judgment of divorce and subject to time limitations."

Appellant then compounds his erroneous attempt at conflating a Judgment of Divorce

deficiencies, the Judgment of Divorce:

1. fails to identify the Appellant as "participant" and the Appellee as the "alternate payee" and fails to set forth the address of the participant and the alternate payee, *cf.* 29 USC §1056(d)(3)(C)(i);[3]

2. fails to state the date of the marriage in order that the "marital portion" of the benefit might be determined, *cf.* 29 USC §1056(d)(3)(C)(ii) and (iii);

3. fails to identify the name of the pension plan, *cf.* 29 USC §1056(d)(3)(C)(iv); and,

4. fails to identify the duration of the intended payment to the Alternate Payee, *cf.* 29 USC §1056(d)(3)(C)(iii).

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with a QDRO, by pointing out that the Neville court's reliance on the Court of Appeals' prior holding, in Mixon v Mixon, 237 Mich App 159; 162 NW2d 406 (1999), that the statute [MCL § 552.101(4)] required that pension rights be decided conclusively within divorce proceedings.

However, neither Mixon, nor Neville, discussed *infra* at 10, stand for the proposition that the Judgment of Divorce is a QDRO. Appellant wants this Court to ignore the material distinction between a Judgment of Divorce's declaration, consistent with the obligations under MCL §552.101(4), of a divorcing spouse's fixed or liquidated right (as between the spouses themselves) to his or her share of the marital portion of an ex-spouse's pension and the divorcing spouse's separate ability to enforce that right as against the pension itself by a subsequent entry of a compliant QDRO. When the Judgment of Divorce does not constitute a QDRO, as in the case at bar, there is material relevance to this distinction for purposes of this Court's application of the federal preemption that dictates that Appellee's right to enforce a claim to the Appellant's pension did not "accrue" at the time of the Judgment of Divorce's entry. See discussion *infra* at 15 et seq.

[3] "A QDRO is defined as one that recognizes the existence of an alternate payee's right, or assigns to an alternate payee the right to receive all or a portion of the benefits payable with respect to a participant under a plan. Section 1056(d)(3)(B)(i). Hence, by its nature, a QDRO must include an alternate payee. Thus, the requirement of §1056(d)(3)(C)(i) – that the QDRO must include 'the name and mailing address of each alternate payee covered by the order' – is likely the most essential requirement of subsection (C)." O'Neil v O'Neil, 136 F.Supp.2d 690, 694 (E.D. Mich 2001).

From the Appellant's pleadings in the trial court and in his appellate filings, it is known that the Appellant is not and has never claimed that the Judgment of Divorce actually constitutes a QDRO.

Why is this significant? Under 29 USC §1144(b)(7), QDROs are excepted from the federal preemption scheme set forth in 29 USC §1144(a). However, where the Judgment of Divorce fails to qualify as a QDRO, then the general ERISA federal preemption scheme still applies.[4] Federal law, not state law, determines whether the Appellee's later submission of the QDRO constitutes an act to enforce the Judgment of Divorce, such that a statute of limitations may bar such action. In response, it is clear that federal law holds that a later submission of a QDRO does not constitute an act to enforce a judgment of divorce.

In Gendreau v Gendreau (In Re Gendreau), 122 F.3d 815 (9th Cir 1997), cert den 523 U.S. 1005, 118 S.Ct. 1187, 140 L.Ed.2d 318 (1998), the 9th Circuit Court of Appeals held that the QDRO provisions of ERISA do not mean that an ex-spouse has no interest in an ERISA qualified plan until she or he obtains the QDRO. Rather, Gendreau holds that ERISA provisions merely prevent the ex-spouse from enforcing such interest until the QDRO is obtained. Id.[5]

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[4] Where the Judgment of Divorce failed to mention in any specific way the plan to which a divorce order applied, as required by 29 USC §1056(d)(3)(D) and the Judgment of Divorce failed to constitute a QDRO, the preemption provisions of 29 USC §1144 remained effective and the beneficiary designation in a life insurance policy controlled, as federal law required. Metro. Life Ins. Co. v Mulligan, 210 F.Supp.2d 894 (ED Mich 2002).

[5] In Gendreau, a first submitted QDRO was rejected by the plan administrator. Thereafter, the ex-husband filed for chapter 7 bankruptcy relief before an amended QDRO was filed. Gendreau, 122 F.3d at 817. In a declaratory action regarding

Axiomatically, if the enforcement right under ERISA, in relation to an established interest in a pension plan under a Judgment of Divorce, doesn't arise until the QDRO is obtained, then there is no enforceable right to the pension originating from the non-qualifying Judgment of Divorce itself.[6] In other words, if there is no enforceable right to the pension originating from the Judgment of Divorce, then Michigan's ten-year statute

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dischargeability of the ex-wife's pension interest, the Ninth Circuit held that the wife had "at least . . . .a right to obtain a proper QDRO that could not be discharged" in the bankruptcy case, because the state court divorce judgment established the interest in the pension, albeit not enforceable until a QDRO entered. Id. at 818. Gendreau was viewed as persuasive and its reasoning regarding the creation of a distinct, non-dischargeable interest in an ex-spouse's pension, (originating from a divorce judgment) was adopted in In Re Hthiy, 283 B.R. 447 (Bankr.E.D.Mich2002) and In Re Combs, 435 B.R. 467 (Bankr.E.D.Mich2010).

[6] This conclusion is not affected by the Appellant's red herring argument, at page 5 of his Application, that "[r]etirement benefits accrue at the time that rights to the benefits are earned by the party, and Michigan statute directs that retirement benefits accrued during the marriage are divisible in the divorce." See MCL §552.18(1). Appellant seems to not understand the subtle but very material difference in the use of the word "accrual." Undoubtedly, pension benefits that "accrue" during the marriage become part of the marital estate subject to an award or division in a Judgment of Divorce. But "accrue" in that sense is not the same as "accrue" in terms of an enforceable right as against a pension, enabled by the entry of a QDRO. Federal statutes and case law make this distinction clear.

Beyond that, however, the Appellant's reading of and reliance on MCL §552.18(1) to establish that a right to the pension ***accrues*** upon entry of the Judgment of Divorce ignores the plain language of the Michigan statute. Under the MCL §552.18(1), benefits "***accrued*** by the party ***during marriage***" shall be subject to division in a Judgment of Divorce. Clearly, the Legislature wasn't using the word "accrued" or "accrual," as Appellant would urge, in the sense of initiating imposition of a limitation period. If that were the case, is Appellant suggesting that the statute of limitations is triggered prior to entry of the Judgment of Divorce – after all, the benefits "accrued" during the marriage? Such a conclusion, of course, is nonsensical. In using the word "accrued" in MCL §552.18, the Legislature was speaking to the ability of the parties and, in turn, the Court to identify, liquidate or fix the parameters of a marital estate subject to division by a Judgment of Divorce.

of limitations on the enforcement of the Judgment of Divorce is completely irrelevant to the issue of the Appellant's later submission of the QDRO. Put yet another way, there was no claim to accrue, which would have triggered the initiation of any limitations period.[7]

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[7] This conclusion is consistent with other federal rulings, outside the 6th Circuit, but which support this proposition that delayed entry of the QDRO, which creates the enforceable interest, is entirely permissible. Trs. of the Dirs. Guild of America-Producer Pension Benefits Plans v Tise, 234 F.3d 415 (9th Cir. 2001), amd on other grounds, reh, en banc, den 255 F.3d 661 (9th Cir. 2001), held that there is no "conceptual" reason why a QDRO must be obtained before a plan participant's benefits become payable on account of his retirement or death.

The issue of delayed submission of QDRO more than 10 years from the entry of the judgment of divorce was ruled upon in August, 2006 in the Macomb County Circuit Court case of Ferrell v Ferrell, Macomb County Circuit Court, Case No. 1994-5581-DM. See Exhibit A. While admittedly this case is of no binding, precedential value to this Court at all, nor was it to the lower courts, the case does highlight appellate authority from other jurisdictions that touches on this ERISA interpretation, relative to the delayed submission of a QDRO.

In ruling that the delayed submission of a proposed QDRO more than ten years from the entry of the Judgment of Divorce did not violate Michigan's statute of limitations, Macomb Circuit Court Judge Mark S. Switkalski cited and relied heavily upon the reasoning from Jordan v Jordan, 147 SW3d 255, 257, 261-263 (Tenn App 2004), quoting:

> "Deborah L. Jordan ("Wife") filed a proposed 'qualified' domestic relations order ("QDRO") with the trial court clerk more than 10 years after divorce from Walter B. Jordan ("Husband"). The trial court entered the proposed QDRO. Husband filed a motion for relief from judgment, arguing that the entry of the proposed QDRO was barred because the Wife failed to act 'within the ten (10) years of the entry of [the] judgment contained in the Final Decree of Divorce,' citing Tenn. Code Ann. §28-3-110 (2000). The trial court granted Husband's motion and set aside the previously-entered QDRO. Wife appeals, arguing that the ten year statute of limitations does not apply to the filing of a proposed QDRO because, according to her, such a filing is not an action to enforce a judgment. We agree with Wife's position. Accordingly, we reverse the judgment of the trial court.
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> . . .

Appellant's claim that the Appellee's 2015 or 2016 submission of the QDROs violated Michigan's ten year statute of limitations period must fail. This Court should deny leave to consider the Appellant's deficient legal argument.

C. Even if the federal preemption scheme under ERISA was not applicable, the Appellant's application for leave to appeal must still fail. At its earliest, the Appellants claim to a portion of Appellant's pension benefit accrued when the Appellant initiated pension payments in June, 2014. The ten year statute of limitations did not bar submission entry of either the 2015 or 2016 QDROs.

Michigan law has well-settled public policy supporting application of statutes of limitations. "Statutes of limitations are procedural devices intended to promote judicial economy and protect the rights of defendants by precluding litigation on stale claims. Stephens v Dixon, 449 Mich 531, 534; 536 NW2d 755 (1995)." AG, 257 Mich App 564, at 569.

Enforcement of judgments in Michigan adhere to a general ten-year statute of limitations. MCL §600.5809(3) provides:

> (3) Except as provided in subsection (4), the period of limitations is 10 years for an action founded upon a judgment or decree rendered in a court of record of this state, or in a court of record of the United States or of another state of the United States, from the time of the rendition of the judgment or decree. The period of limitations is 6 years for an action founded upon a judgment or decree rendered in a court not of record of this state, or of another state, from the time of the rendition of the judgment or decree. A judgment entered in the district court of this state

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"In the instant case, the judgment of divorce 'create[d]' Wife's right to receive benefits under Husband's plan. See generally 29 U.S.C. §1056(d)(3)(B)(i)(I). The proposed QDRO simply 'recognizes' that right. See generally ***id***. However, until the plan administrator approves Wife's proposed QDRO, her right to receive benefits under Husband's plan, even though set forth in a validly-entered judgment of divorce, **is not enforceable under ERISA**. * * * [emphasis added]

> before May 25, 1973, is a judgment of a court not of record. A judgment entered in the district court of this state on or after May 25, 1973, except a judgment entered in the small claims division of the district court, is a judgment of a court of record. Within the applicable period of limitations prescribed by this subsection, an action may be brought upon the judgment or decree for a new judgment or decree. The new judgment or decree is subject to this subsection.

Limitations periods, typically, begin to run from the time claims accrue, including the periods applicable to enforcement of judgments. As MCL §600.5827 provides:

> "Except as otherwise expressly provided, the period of limitations runs from the time the claim accrues. The claim accrues at the time provided in sections 5829 to 5838, and in cases not covered by these sections the claim accrues at the time the wrong upon which the claim is based was done regardless of the time when damage results." [emphasis added]

Michigan case law establishes that claims of this nature, i.e. obligated payments derived from judgments of divorce, accrue as payments "become due." In other words, a claim does not accrue until a right to payment exists. See Rybinski v Rybinski, 333 Mich 592, 596; 53 NW2d 386 (1952) and Torakis v Torakis, 194 Mich App 201; 486 NW2d 107 (1992).

Clearly, Appellant's pension payment did not "become due" until he elected to initiate payments upon retirement in June, 2014. Accordingly, the Appellee's right to receive a portion of those pension payments could not have accrued prior to June, 2014.

Appellant's claim that the Appellee's 2015 or 2016 submission of the QDROs violated Michigan's ten year statute of limitations period must fail. This Court should deny leave to consider the Appellant's deficient legal argument.

D. Where the Neville decision interprets application of MCR 2.612, in relation to the amendment of a previously entered QDRO and is silent as to the application of any statute of limitations, the Appellant's reliance on Neville is misplaced and is not a basis to grant this application.

Appellant curiously relies upon Neville v Neville, 295 Mich App 460, 812 NW2d 816 (2012), in support of his argument that a ten year statute of limitations, generally applicable to the enforcement of a judgment, barred Appellee's entry of a QDRO more than ten years after the 2005 Judgment of Divorce. Not only does the Neville opinion not discuss the relevance of any statute of limitations to the amended QDRO submission in that case, the opinion does not even contain the phrase "statute of limitations." Appellant's reliance on Neville in this instance is wholly misplaced and very misleading.

In Neville, the parties were divorced on November 14, 1994 by entry of a default Judgment of Divorce. The Judgment of Divorce contemplated that the Plaintiff/Wife was awarded ½ of the present value of the general retirement pension through the Defendant/Husband's employer, the Ford Motor Company. Without going into detail regarding the particulars of the divorce judgment and the original QDRO, it is sufficient to note that the original QDRO was submitted and entered on March 14, 1995.

Defendant/Husband, years later, took exception to some of the language in the original QDRO that a plan administrator had indicated would expand the Plaintiff/Wife's recovery of pension benefits beyond that contemplated by the Judgment of Divorce, specifically relating to certain early-retirement incentives and surviving-spouse benefits earned by defendant after the divorce. The Defendant/Husband moved for clarification

and an amendment of the QDRO, relying on MCR 2.612(C)(1)(a) and (f). Granting the Defendant's motion on August 12, 2009, the trial court entered an amended QDRO on March 11, 2010.

The Plaintiff appealed the trial court's amendment of the QDRO. As directed by the Supreme Court on an earlier remand, Neville examined whether the Defendant's motion to amend the QDRO was time-barred under application of MCR 2.612. MCR 2.612(C)(1)(a) and (f) provides that a "court may relief a party from 'final judgment, order or proceeding' on the basis of '[m]istake, inadvertence, surprise, or excusable neglect" or [a]ny other reason justifying relief from the operation of the judgment. MCR 2.612(C)(2) provides '[t]hat motion must be made within a reasonable time, and, for the grounds stated in subrules (C)(1)(a), (b), and (c), within one year after the judgment, order, or proceeding was entered or taken."

Neville concluded that MCR 2.612 barred the amendment of the March 15, 1995 QDRO because it constituted a part of the final judgment, or the Judgment of Divorce, entered on November 14, 1994. In other words, relief from the judgment would not be appropriate where such relief was sought more than one year after entry of the judgment.

This Neville issue and holding is qualitatively different than the issue presented in this matter. Neville does not address the application of a ten year statute of limitations to enforce a judgment. (Remember, Appellant's claim is that Michigan's ten year statute of limitations bars entry of the QDRO as an act to enforce the Judgment of Divorce.) Neville does not address any statute of limitations, period.

Appellant's mistaken reliance on Neville originates, at least in part, from a fundamental misunderstanding of the enforcement mechanism and the obligor under an entered QDRO. The act of entering a QDRO isn't enforcing the judgment, as in pursuit of an accrued claim against the participant spouse, but rather constitutes the implementation of the terms of the judgment necessary to render the claim to the pension enforceable as against the plan. The Appellant misses this point entirely.

This relevant distinction is entirely consistent with the federal precedent, discussed *supra* at 13-18. In Re Hthiy, 283 B.R. 447, 451 (Bankr.E.D.Mich.2002), adopting the Ninth Circuit's reasoning in Gendreau, noted that:

> "The court [Gendreau] reasoned that the divorce decree, which had ordered the completion of a QDRO to satisfy ERISA's anti-alienation provision, effectively had divested the debtor of half the pension fund. Therefore, the ex-wife's divorce award allowed her to pursue a claim against the pension plan itself, not against the debtor, which meant that the debtor did not personally owe the ex-wife a 'debt' that could be discharged in bankruptcy. Id. at 819." [Emphasis added.]

Similarly, in the case at bar, when the Appellee's right to or interest in ½ of the marital portion of the Appellant's pension is established in the Judgment of Divorce, at that point, the Appellee has been effectively, contractually divested of his interest in that portion of the pension. It is the transferred right to this same portion of the pension that the Appellee subsequently renders enforceable against the plan by entry of a compliant QDRO.

Application of a statute of limitations to prevent Appellee's submission of that QDRO would do nothing to re-establish or re-vest the ½ interest in the Appellant's pension surrendered under the Judgment of Divorce, nor does it render him legally

entitled to retain the benefits of such payment. Put another way, the Appellee's actions in submitting the QDRO are not directed at enforcing her interest against this Appellant – that interest has already been attained and is established. It is rather rendering *enforceable* her claim against the pension plan. Neville, erroneously relied upon by this Appellant, does not create any applicable limitation against Appellee's enforceability of that claim.

Appellant's reliance on Neville is misplaced and not persuasive precedent. This Court should deny leave to consider the Appellant's deficient legal argument.

CONCLUSION AND RELIEF REQUESTED

For and based upon the aforementioned reasons, Appellee Sherry Sue Dorko respectfully requests that this Court summarily deny the Appellant's Application for Leave to Appeal.

Dated: 10/26/17

BUTLER, TOWESON & PAYSENO – PLLC

By: _____
George T. Perrett (P42751)
Attorneys for Appellee Sherry Sue Dorko

EXHIBIT A

STATE OF MICHIGAN

MACOMB COUNTY CIRCUIT COURT

CHARLES FERRELL,

Plaintiff,

vs. Case No. 1994-5581-DM

LINDA ANN FERRELL,

Defendant.

_____/

OPINION AND ORDER

Plaintiff Charles T. Ferrell has filed objections to the entry of proposed orders regarding the division of his retirement and/or pension plans.

I. BACKGROUND

Plaintiff filed this action on December 13, 2004 asserting the parties were married November 8, 1982. Three children were born during the marriage, all of whom have now reached the age of maturity.

A *Pro Confesso Judgment of Divorce* entered March 14, 1996 awarded defendant 50% of plaintiff's retirement and/or pension plans with the United Parcel Service, Inc. and United States government. Defendant Linda Ann Ferrell sent proposed orders dividing the retirement and/or pension plans to plaintiff in April 2006.

Plaintiff now objects.

II. ANALYSIS

A. MCR 2.602(B)(3)

As a preliminary matter, plaintiff has not proffered evidence of any prejudice from

defendant's asserted failure to comply with the seven-day rule of MCR 2.602(B)(3). Hence, plaintiff has waived further consideration of this issue.

B. Statute of Limitation

MCL 600.5827 provides:

> Except as otherwise expressly provided, the period of limitations runs from the time the claim accrues. The claim accrues at the time provided in sections 5829 to 5838, and in cases not covered by these sections the claim accrues at the time the wrong upon which the claim is based was done regardless of the time when damage results.

The general rule is that a claim does not accrue until a right to payment exists. See *Rybinski v Rybinski,* 333 Mich 592, 596; 53 NW2d 386 (1952) ("statute of limitations begins to run against each alimony installment as it becomes due"); *Gutowski v Gutowski,* 266 Mich 1; 253 NW 192 (1934); *Rzadkowolski v Pefley,* 237 Mich App 405, 410; 603 NW2d 646 (1999), citing *Ewing v Bolden,* 194 Mich App 95, 99; 486 NW2d 96 (1992) ("the ten-year period of limitation began to run against each [child support] payment when that payment became due") and *Gabler v Woditsch,* 143 Mich App 709, 711; 372 NW2d 647 (1985) (under the August 1968 divorce decree, balance of property settlement became due in July 1975; hence, plaintiff's claim accrued in July 1975 and his June 1983 complaint was timely filed within the applicable ten-year period).

Indeed, the *Gutowski* Court is particularly instructive:

> On May 17, 1921, the superior court...granted a decree of divorce to Marie Gutowski against Arthur Gutowski...ordering him to pay the sum of $30 each and every week...as alimony for the support of herself and minor child. * * * At the time of trial, plaintiff limited her claim to $2,180, constituting alimony at $30 a week for the period of slightly over the 72 weeks just prior to June 15, 1931, when the present suit was begun. She recovered a judgment for this amount and costs.
>
> Defendant contends that plaintiff is precluded from bringing this suit because it was not instituted until more than 10 years after the date of the original decree. This claim is untenable. A decree of divorce does not become outlawed in 10 years. The delinquent installments of alimony...all accrued within two years prior to the beginning of the present suit and therefore, were not outlawed.

Gutowski, supra at 2.

While none of these cases are specific to the filing of proposed qualified domestic relations orders ("QDROs") more than ten years after the entry of a divorce judgment, the same rationale would apply. Defendant would not suffer a wrong until such time as she was denied her share of plaintiff's retirement and/or pension benefits, benefits that are not even be due until plaintiff retires. Hence, the statute of limitation on defendant's claim for retirement and/or pension benefits would not accrue until plaintiff begins receiving his retirement and/or pension benefits and defendant did not receive her share. On this line of reasoning, *Jordan v Jordan,* 147 SW3d 255, 257, 261-263 (Tenn App, 2004) is most persuasive:

> Deborah L. Jordan ("Wife") filed a proposed "qualified" domestic relations order ("QDRO") with the trial court clerk more than 10 years after her divorce from Walter B. Jordan ("Husband"). The trial court entered the proposed QDRO. Husband filed a motion for relief from judgment, arguing that the entry of the proposed QDRO was barred because Wife failed to act "within ten (10) years of the entry of [the] judgment contained in the Final Decree of Divorce," citing Tenn. Code Ann. § 28-3-110 (2000).[1] The trial court granted Husband's motion and set aside the previously-entered QDRO. Wife appeals, arguing that the ten-year statute of limitations does not apply to the filing of a proposed QDRO because, according to her, such a filing is not an action to enforce a judgment. We agree with Wife's position. Accordingly, we reverse the judgment of the trial court.
>
> * * *
>
> In the instant case, the judgment of divorce "create[d]" Wife's right to receive benefits under Husband's plan. *See generally* 29 U.S.C. § 1056(d)(3)(B)(i)(I). The proposed QDRO simply "recognizes" that right. *See generally* ***id.*** However, until the plan administrator approves Wife's proposed QDRO, her right to receive benefits under Husband's plan, even though set forth in a validly-entered judgment of divorce, is not enforceable under ERISA. * * *
>
> In ***Duhamel v. Duhamel,*** 188 Misc. 2d 754, 729 N.Y.S.2d 601 (N.Y. Sup. Ct. 2001), a New York supreme court was faced with a question not dissimilar to the one before us. The parties in ***Duhamel*** were divorced on December 19, 1986. ***Duhamel,*** 188 Misc. 2d at 754, 729 N.Y.S.2d at 601. The judgment of divorce incorporated the separation agreement, which recognized the former wife's right to receive a portion of her former husband's retirement benefits and granted the

[1]The language of Tenn Code Ann § 28-3-110 mirrors that of MCL 600.5809(3).

former wife a proposed QDRO with respect to those benefits. ***Duhamel,*** 188 Misc. 2d at 754-55, 729 N.Y.S.2d at 601-02. Some fourteen years after the judgment of divorce, "after learning of the [former husband's] imminent retirement," the former wife "sought entry of the proposed QDRO". ***Duhamel,*** 188 Misc. 2d at 755, 729 N.Y.S.2d at 602. The former husband contended that his former wife's "request to have [the] Court enter a QDRO more than fourteen years after the entry of the parties' judgment of divorce is barred by the[] [applicable six-year] statutes of limitations." ***Id.***

The court in ***Duhamel*** concluded "that the entry of the [proposed] QDRO is governed by [the applicable statute of limitations]"; however, the court emphasized that the "limitation period does not begin to run until a cause of action or claim has accrued." ***Id.*** In ***Duhamel,*** the court determined that "since [the former wife's] right to receive a distribution under the [former husband's] retirement plan did not accrue until after her former husband reached pay status, the [applicable statute of limitations] . . . did not begin to run until his retirement date." Id. 188 Misc. 2d at 756, 729 N.Y.S.2d at 603.

In subsequent litigation involving the Duhamels, the same New York Supreme Court characterized "an action to compel entry of QDRO" as one "to compel the other [spouse] to perform a mere ministerial task necessary to distribute funds previously allocated by the parties' own binding agreement." ***Duhamel v. Duhamel,*** 194 Misc.2d 100, 101, 753 N.Y.S.2d 673 (N.Y.Sup.Ct. 2002).

We agree with the result reached in the first ***Duhamel*** decision. * * *

The plan administrator in the instant case has yet to approve the proposed QDRO. Hence, the trial court's decree cannot be enforced against the "holder of the purse strings." Any attempt to "enforce" the trial court's validly-entered division of Husband's pension plan would be futile. We conclude from all of this that the approval of the proposed QDRO is adjunct to the entry of the judgment of divorce and not an attempt to "enforce" the judgment. It is an essential act to bring to fruition the trial court's decree regarding a division of Husband's interest in the Dupont pension plan. Until the proposed QDRO is approved by the plan administrator and entered by the trial court, the act of the trial court in dividing the pension plan *is not complete and hence not enforceable.* It can be accurately described as inchoate in nature. It follows that Wife's attempt to obtain the approval of the plan administrator of the proposed QDRO and the entry of that order is not an action to enforce the divorce judgment, and hence is not barred by the ten-year statute of limitations. [Emphasis original.]

Therefore, defendant is not time barred from seeking entry of orders implementing her right to a share of plaintiff's retirement and/or pension plans.

C. Terms

The *Pro Confesso Judgment of Divorce* provides in pertinent part:

IT IS FURTHER ORDERED AND ADJUDGED that, except as otherwise provided in this Pro Confesso Judgment of Divorce...each of the parties hereto hereby forever relinquishes all rights and interest in any pension, profit sharing, annuity, or retirement benefits, or any accumulated contributions in any pension, profit sharing, annuity or retirement system, as well as any rights or contingent rights to unvested pension, profit sharing, annuity, or retirement benefits that the other shall have accrued and each of the parties hereto shall hold such rights and benefits free and clear of any such claims which are expressly terminated by the Pro Confesso Judgment of Divorce.

IT IS FURTHER ORDERED AND ADJUDGED that Defendant, Linda Ferrell, is awarded, as an alternate payee under a Qualified Domestic Relations Order, a 50% interest in the benefits due Plaintiff pursuant to his retirement and/or pension plan with United Parcel Service, Inc. and the United States government as of the date of entry of this Pro Confesso Judgment of Divorce plus any increases or decreases in the value of that allotted share after that date. * * *

IT IS FURTHER ORDERED AND ADJUDGED that the parties shall execute such Qualified Domestic Relations Orders in order to effectuate the intent of this provision....

IT IS FURTHER ORDERED AND ADJUDGED that until such time as said QDROs are accepted and implemented by the administrator of the plan in question, Plaintiff, Charles Ferrell, shall maintain Defendant, Linda Ferrell, as beneficiary of any pre-retirement or post[-]retirement survivorship options, and/or as the beneficiary of those funds under Plaintiff's will or estate plan, to the extent of the alternative payee's proportionate interest is awarded in this judgment.

In *Quade v Quade*, 238 Mich App 222, 224-226; 604 NW2d 778 (1999), the court stated:

[T]his Court has held that separate and distinct components of pension plans must be specifically awarded in a judgment of divorce in order to be included in a QDRO. In *Roth v Roth*, 201 Mich App 563, 569; 506 NW2d 900 (1993), this Court held that the right of survivorship in a pension plan will not be extended to a divorced spouse unless it is specifically included as part of the pension award in the judgment of divorce. Similarly, early retirement benefits are a separate and distinct component of defendant's pension plan that were not specifically included in plaintiff's property settlement in the judgment of divorce.

* * *

Moreover, following the specific pension awards for each party, the judgment of divorce states, "IT IS FURTHER ORDERED that each party waives any and all interest in any IRA, Pension or Profit Sharing Plan, in which the other may have an interest, except as specifically provided for herein." This provision would apply to defendant's unvested early retirement benefits and effectively waives any and all interest plaintiff may have had in those benefits.

PLAINTIFF GETS NO SURVIVOR

1. Proposed QDRO

The language awarding defendant 50% of the retirement and/or pension benefits due

plaintiff as March 14, 1996 "*plus any increases* or decreases in the value of the *allocated share after that date*" would result in a coverture fraction in which the numerator is the number of months of credited service during the marriage and the denominator is the total number of months of credited service at the time of plaintiff's retirement. The subject clause envisioned an increased share rather than a frozen valuation.

Under the plain language of the *Pro Confesso Judgment of Divorce*, defendant is entitled to 50% of the retirement and/or pension benefits due plaintiff under his retirement and/or pension plans. The record is devoid of any evidence as to the terms of such plans. Hence, it is unclear if defendant has the ability to elect to commence receiving her share of retirement and/or pension benefits when plaintiff reaches the "earliest retirement age" or must wait until plaintiff begins receiving such benefits.

Plaintiff does not dispute defendant's right to receive a survivorship benefit. Defendant will receive the survivorship benefit as calculated by the retirement and/or pension plans, which may or may not utilize a separate interest method.

Plaintiff correctly notes defendant is limited to receiving 50% of his regular benefits paid under the retirement and/or pension plans. Defendant shall receive such benefits whether characterized as normal retirement, early retirement, disability retirement or other retirement when plaintiff begins receiving such benefits. Defendant is not entitled to a share of any early retirement subsidies or supplements, interim supplements, early retirement windows or incentives but would retain a right to temporary benefits. *Quade, supra.* Defendant would also be entitled to cost-of-living adjustments and plan improvements or enhancements under the language awarding her any increases in the value of her share.

3. Proposed Qualifying Court Order

Plaintiff is obviously represented by counsel. He also signed the *Pro Confesso Judgment of Divorce*. However, he is not apparently raising the Service members Civil Relief Act, 50 USC App 501 *et seq.*, as a bar to these proceedings.

The issues of the proper division date, commencement date and adjustments are discussed *supra* and need not be addressed again.

Plaintiff has proffered his Service History in support of his calculation of his 'retirement points'.[2] The parties were married for 313 days of the 365 days between September 17, 1982 and September 16, 1983 or 86% of that time period; they were also married for 179 days of the 366 days between September 17, 1995 and March 14, 1996 (1996 being a leap year) or 49% of that time. Adjusting the retirement points for these time periods (86% of 133 points is 114 points and 49% of 151 points is 74 points) and adding the retirement points for the remaining twelve years would result in 1,402 retirement points having been earned during the marriage.

The pension and retirement benefit provision of the *Pro Confesso Judgment of Divorce* referred to QDROs being entered with respect to each retirement and/or pension plan. Plaintiff's military retirement is one such plan. The language awarding defendant a survivorship benefit used similar terminology. While the nomenclature may be incorrect with respect to plaintiff's military pension (a qualified court order being required for division rather than a QDRO), the intent to award survivorship benefits to defendant is clear. It is axiomatic that such a right is dependent upon the availability of such an election under the military pension plan.[3]

IV. CONCLUSION

For the reasons set forth above, plaintiff Charles T. Ferrell's objections to the entry of

[2]No explanation of the form is provided. It is unclear why his total points and apparent retirement points are, except in one instance, different.

[3]In any event, defendant would be protected by having an interest in plaintiff's will or estate to the extent of her share.

proposed orders dividing retirement and/or pension plans are:

A. DENIED, in part, under MCR 2.602(B)(3);

B. DENIED, in part, with respect to the running of the statute of limitation under MCR 600.5809(3) and

C. GRANTED, in part, and DENIED, in part, with respect to the terms of the proposed orders as delineated above.

Defendant Linda Ann Ferrell shall procure a new proposed QDRO and qualified court order consistent with these holdings and present them under MCR 2.602(B)(3).

This *Opinion and Order* neither resolves the last pending claim in this matter nor closes the case. MCR 2.602(A)(3).

IT IS SO ORDERED.

MARK S. SWITALSKI

Mark S. Switalski, Circuit Judge

MSS/vs

Dated: August 2, 2006

Cc: Renee D. Tegel, Attorney at Law
Jacob M. Femminineo, Jr., Attorney at Law

A TRUE COPY
Carmella Sabaugh
COUNTY CLERK
BY